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No. 92-

In The

Supreme Court of the United States

October Term, 1992

RONALD P. SHIRK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. To support a criminal conviction, does the federal currency reporting law, as amended in 1986, require proof of knowledge that "structuring" is illegal, or is the *mens rea* of "willfully" structuring a transaction "for the purpose of evading" a reporting requirement satisfied by proof that a bank customer knew that the bank would be required to report any cash transaction involving more than $10,000?

2. Does the owner of a legitimate business violate the federal currency reporting law, as amended in 1986 to prohibit "structuring" of "any transaction" in currency to "evade" a reporting requirement, by increasing the frequency of the business's cash deposits from weekly to several times per week so that no more than $10,000 is accumulated before a deposit is made?

3. Where a district judge, imposing sentence under the federal sentencing guidelines, grants a downward departure for a combination of reasons believed to constitute mitigating circumstances not adequately considered in the formulation of the guidelines, must the court of appeals reverse upon concluding that each reason, separately and literally analyzed, was given some consideration by the Sentencing Commission?

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LIST OF ALL PARTIES

*** The caption of the case in this Court contains the names of all parties (Ronald P. Shirk and the United States).**

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RONALD P. SHIRK respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on December 3, 1992, as amended February 16, 1993, affirming his conviction for willfully structuring currency transactions to evade a reporting requirement, and remanding for resentencing, reversing the downward departure sentence selected by the district court.

OPINIONS BELOW

The Third Circuit's opinion (per Cowen, J., with Greenberg & Weis, JJ.) and the Court's accompanying judgment, Appx. C, were filed December 3, 1992. The Opinion is published as *United States v. Shirk*, 981 F.2d 1382 (3d Cir. 1992). It is Appendix B to this petition; the amendment to the opinion, issued upon "grant" of rehearing on February 16, 1993, is in Appendix D. There is no published opinion of the District Court; its unpublished opinion on post-trial motions is Appendix G. The Judgment of the district court (Hon. William W. Caldwell, U.S.D.J.), dated and filed March 3, 1992, imposing sentence, is Appendix E. The district court's oral statement of reasons is Appendix F.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on December 3, 1992.

Appendix C. The court of appeals' Order granting petitioner's petition for panel rehearing (by which the court merely amended the directions to the district court on remand) was entered on February 16, 1993. Appx. D. An amended judgment, reflecting the terms of the amended opinion, was filed March 31, 1993. Appx. A. This petition is filed within 90 days of February 16. Rules 13.1, 13.4 (1990 rev.). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATION INVOLVED

The Bank Secrecy Act, provides, in part:

> (a) when a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. . . .

31 U.S.C. § 5313.[1]

> (a) A person willfully violating this subchapter or a regulation prescribed under this subchapter . . . shall be fined not more than $250,000, or

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[1] The applicable regulations of the Secretary of the Treasury, in turn, require CTRs to be filed by domestic financial institutions, whenever coin or currency in an amount more than $10,000 is deposited, withdrawn, or exchanged, unless the transaction has been exempted in accordance with the regulations. 31 C.F.R. § 103.22(a)(1).

imprisoned for not more than five years, or both.

(b) A person willfully violating this subchapter or a regulation prescribed under this subchapter . . . , while violating another law of the United States or as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned not more than 10 years, or both.

31 U.S.C. § 5322.

No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction:

* * * *

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

31 U.S.C. § 5324 (as added October 27, 1986).

The Treasury Department's implementing regulations explicate the statutory term "structure . . . any transaction" as follows:

a person structures a transaction if that person, acting alone, or in conjunction with, or on behalf of, other persons, conducts or attempts to conduct one or more transactions in currency, in any amount, at one or more financial institutions, on one or more days, in any manner, for the purpose of evading the reporting requirements under section 103.22 of this Part. "In any manner" includes, but is not limited to, the breaking down of a single sum of currency exceeding $10,000 into smaller sums including sums at or below $10,000 or the conduct of a transaction, or series of currency transactions, including transactions at or below $10,000. The

> transaction or transactions need not exceed the $10,000 reporting threshold at any single financial institution on any single day in order to constitute structuring within the meaning of this definition.

31 C.F.R. § 103.11(n) (1989) (codified since 1990 as *id.* § 103.11(p)).

STATEMENT OF THE CASE

This petition arises from a conviction after a jury trial in the Middle District of Pennsylvania on two counts charging that the petitioner, the owner of a successful, lawful, wholesale gun business, willfully structured the deposit into the business's bank account of the legitimate cash receipts of the business, when he increased the frequency of cash deposits for the purpose, in part, of avoiding triggering the requirement that the bank report to the IRS all cash transactions involving more than $10,000, in violation of 31 U.S.C. §§ 5322 and 5324(3). The petitioner was acquitted at trial of allegedly related tax evasion charges.

The district court (the Hon. William W. Caldwell, U.S.D.J.) imposed a nine-month sentence, Appx. E, departing downward for a combination of four reasons from a sentencing guideline range calling for at least two years' imprisonment. Appx. F. On the government's cross-appeal the court of appeals reversed the departure and remanded for resentencing. On petitioner's appeal, the Third Circuit affirmed. Appx. A. The court held that the district court's instruction properly equated "willfulness" under the anti-structuring statute with an intent to "avoid" the bank's compliance with its duty, known to the petitioner, to report currency transactions of more

than $10,000. Knowledge of the obligation not to structure was not required, the court added, and the evidence was sufficient for conviction. Appx. B. Rehearing was granted for the limited purpose of amending the opinion to allow more flexibility to the district court on the remand for resentencing. Appx. D. A stay of mandate pending certiorari was denied, Appx. H, but petitioner remains free on bail pending appeal set by the court of appeals. Resentencing is presently scheduled for late July, 1993.

Statement of Lower Court Jurisdiction Under Rule 14.1(i). The district court's jurisdiction was properly invoked in this case under 18 U.S.C. § 3231, in that the indictment alleged the commission of federal criminal offenses. The jurisdiction of the court below rested upon 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), as to the petitioner's appeal, and was timely invoked by the petitioner's Notice of Appeal filed within ten days of the entry of the judgment of sentence, and by the respondent's Notice of Appeal filed within 30 days of the imposition of sentence. Fed.R.App.P. 4(b); 18 U.S.C. § 3731. The respondent's timely cross-appeal invoked the jurisdiction of the court below under 18 U.S.C. § 3742(b).

Statement of Facts. The underlying facts developed at petitioner's trial are set forth in the Third Circuit's Opinion. Appendix B3-5, 981 F.2d at 1385-86. In March 1989, petitioner's banker informed him that the bank would no longer exempt the cash deposits of Ron Shirk's Shooters Supplies from IRS currency transaction reporting. During the following months, petitioner increased the frequency of his business's deposits, so that none included more than $10,000 in cash. During the previous two years, while the exemption was in effect, there had been 44 deposits of at least that much currency.

Count 9 of the indictment charged the structuring of currency transactions by making 90 listed cash bank deposits at "one or more domestic financial institutions," between March 6, 1989, and February 15, 1990, "for the purpose of evading the reporting requirements of" 31 U.S.C. § 5313(a). The banker testified, however, that he had urged petitioner to increase the frequency of his formerly-weekly deposits both so that petitioner's business could earn more interest and so as to relieve the burden on the bank of having to count and process a single large deposit every Monday morning. Although petitioner received $30,000 in cash from a single customer on February 6, 1990, the business still did not deposit more than $10,000 in currency at one time.

On February 7, 8, 12 and 13, bank deposits were made which included $9000, $7000, $9300 and $7000 in cash. As proof of the separate structuring offense charged in Count 10, evidence was presented at trial that petitioner purchased a property on September 26, 1989, presenting three money orders in the amounts of $9500, $9800 and $9500, which had been purchased on September 6, 8, and 13, 1989, respectively.

REASONS FOR GRANTING THE WRIT

1. The decision below construing both the *actus reus* and the *mens rea* elements of the offense of structuring currency transactions, 31 U.S.C. §§ 5322(b) and 5324(3), is in direct conflict with the First Circuit's in banc interpretation of the same federal statute. Accordingly, this petition presents the same questions on which certiorari has been granted in *Ratzlaf v. United States*, No. 92-1196.

A provision of the Bank Secrecy Act makes it a serious felony offense, punishable by up to ten years in

prison and a half million dollar fine,[2] for a person "willfully" to violate "this subchapter," that is, 31 U.S.C. §§ 5311 through 5326 "or a regulation prescribed under this subchapter . . . , . . . as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period. . . . " 31 U.S.C. § 5322(b). One statute in that subchapter, *id.* § 5324(3), added in 1986,[3] prohibits the act of "structuring . . . any transaction" with a bank "for the purpose of evading the reporting requirements" of the Act, such as the requirement that the bank file a Currency Transaction Report ("CTR") with the IRS concerning any cash transaction involving more than $10,000.

Contrary to the implication of the decision of the court below, however, no statute or regulation prohibits bank customers from choosing, willfully or otherwise, to engage exclusively in cash transactions of $10,000 or less each,[4] even with the knowledge that such transactions are nonreportable while larger transactions will require the bank to file a Currency Transaction Report ("CTR") with the IRS. In holding otherwise, the Third Circuit below, agreeing with the interpretation of several other circuits, construed the statutory terms "willfully" in a manner which conflicts with the unanimous, in banc judgment of

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[2] In addition, under 18 U.S.C. § 982(a)(1), a criminal forfeiture attaches to a conviction for this offense.

[3] The anti-structuring statute, 31 U.S.C. § 5324, became effective January 27, 1987, 90 days after the enactment of the Anti-Drug Abuse Act of 1986.

[4] In this case, the jury was charged that the reporting requirement applies when "a bank or financial institution receives a deposit of *$10,000 or more* in cash. . . . " 3d Cir. Appx. A461. Under the regulation, however, a deposit or withdrawal of exactly $10,000 is not covered.

the First Circuit. On April 26, 1993, in *Ratzlaf v. United States,* No. 92-1196, this Court granted certiorari to resolve this conflict. Certiorari should be granted in this case as well, and the cases should be consolidated for argument, so as to afford the Court an opportunity to construe these statutes after observing their operation in a fuller variety of factual settings and because this case presents the related questions, which should be decided at the same time, as to the meaning of the terms "transaction" and "for the purpose of evading" under this statutory scheme.

a. The Circuits Are in Conflict on the Question of What Constitutes "Willfulness" Under the Anti-Structuring Statutes.

As quoted above, 31 U.S.C. § 5322(b) provides that a violation of § 5324 constitutes a criminal offense only if the violator acts "willfully." In this case, the trial judge charged the jury, over defense objection,[5] that the required *mens rea* is established when a person:

> know[s] about the requirement imposed upon the bank, and . . . knowingly and willfully act[s] in such a way in dealing with his deposit[s] to know that what he was doing would avoid the necessity [sic] for the bank to file the report.

3d Cir. Appx. A461. Thus, the lower court instructed the jury that the only knowledge required to convict was the

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[5] The trial court's attempt to suggest the contrary by stating that "No exceptions appear in the transcript of the charge," Appx. G4, fn. 4, is misleading. In fact, this district judge does not permit a record to be made at sidebar of objections to the jury charge; accordingly, the objections were made in writing immediately after court recessed for the day.

defendant's awareness of the bank's obligations and that these obligations were "imposed upon the bank," implying that they were legal obligations, coupled with knowledge that his conduct would "avoid" the bank's duty to file a report. This Court has granted certiorari in *Ratzlaf, supra,* to decide whether an offense of structuring currency transactions to evade a reporting requirement can be established without proof that the defendant also knew that his own "structuring" conduct was prohibited. The lower court's instructions in this case also erroneously substituted an avoidance standard for the statute's requirement of intent to evade.

Section 5324 prohibits any structuring of a currency transaction "for the purpose of evading" a reporting requirement. For a variety of reasons, this statutory phrase, taken together with the "willfulness" element for a criminal violation under § 5322(b), must be construed to require proof of an intentional violation of a known legal duty. The jury instructions (as well as the evidence[6]) below fell short of this standard.

None of the key terms in this case – "structure," "transaction," "evading" or "willfully" – is defined in the statute. See *id.* § 5312 (definitions). Prior to the enactment of § 5324, the "willfulness" requirement of § 5322(b) had always been construed to require knowledge of the law making the defendant's conduct illegal as well as of the facts constituting such conduct. Thus, the circuits have

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[6] As the trial judge seems to have recognized in the Judgment, Appx. E9, the evidence at trial was insufficient to prove beyond a reasonable doubt an intent to violate a known legal duty. Thus, if this Court reverses the judgment below because of the misinterpretation of the statute, a judgment of acquittal, not merely a new trial, must be ordered on remand.

consistently demanded proof of knowledge that one's conduct was prohibited in cases of failure to declare possession of more than $5000 (later raised to $10,000) in currency while crossing an international border. *See* John K. Villa, Banking Crimes § 6.05[1][a][iii], at 6-53 & n.12 (1991 rev.) (collecting cases on *mens rea* in prosecutions under 31 U.S.C. § 5316, which shares § 5322(b) criminal enforcement provision). See also *United States v. Sturman*, 951 F.2d 1466 (6th Cir. 1991) (failure to maintain records and file reports of foreign monetary transactions under *id.* § 5314, punishable under § 5322). As this Court has recently noted, "Our normal canons of construction caution us to read the statute as a whole, and, unless there is a good reason, to adopt a consistent interpretation of a term used in more than one place within a statute." *United States v. Thompson/Center Arms Co.*, 504 U.S. ___, 112 S.Ct. 2102, 119 L.Ed.2d 308, 316 n.5 (June 8, 1992) (plurality). *A fortiori*, the same clause of the statute, incorporated by reference in two different applications of the same enforcement scheme, ought to mean just one thing. It is only logical to hold that the meaning of "willfully" in § 5322(b) does not change when attached to a structuring violation under § 5324.

This Court has consistently ruled that when Congress imposes a willfulness element as the *mens rea* for crimes in the nature of *malum prohibitum*, knowledge of the nature of the prohibition is required unless the case falls into one of two exceptional categories. First, knowledge of the facts may be enough if the activity is inherently dangerous, so that it can properly be thought that Congress intended to impose a high level of self-restraint by making participants act at their peril. See *United States v. Freed*, 401 U.S. 601 (1971) (possession of unregistered

hand grenade); *United States v. Balint*, 258 U.S. 250 (1922) (sale of narcotics without required order form). The second exception exists where the offense is applicable only to a class of persons who are knowingly engaged in a highly regulated business (which may also be dangerous). Compare *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558 (1971); *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952) (knowledge of the facts all that is required for environmental safety infractions), with *United States v. Park*, 421 U.S. 658 (1975); *United States v. Dotterweich*, 320 U.S. 277 (1943) (strict liability for Pure Food and Drug violations, subject to impossibility defense).

In *malum prohibitum* cases not falling into either of these exceptional categories, however, including but not limited to criminal tax cases, this Court has consistently resolved any ambiguities in Congress's specification of the *mens rea* in favor of the highest level of *scienter* – intentional violation of a known legal duty. This standard was authoritatively established for tax cases in *United States v. Pomponio*, 429 U.S. 10, 12 (1976) (per curiam). In *Cheek v. United States*, 498 U.S. 192 (1991), this Court recently applied this rule to reverse a conviction arising out of a prosecution for tax evasion and failure to file a return, where the defendant claimed he did not know that his wages were taxable as "income" under the Internal Revenue Code and the jury instructions had required any such belief to be found "reasonable" before it could establish a defense.

The same test applies to other *malum prohibitum* offenses where felony penalties apply, whether or not the proscribed conduct is facially "innocent." The *Pomponio* definition of willfulness applies, for example, to criminal

civil rights cases, as construed in *Screws v. United States*, 325 U.S. 91 (1945). In *Liparota v. United States*, 471 U.S. 419 (1985), this Court held that a statute making it an offense knowingly to acquire food stamps in a manner unauthorized by law made knowledge of whether one's manner of acquisition was authorized a required element of proof. As the Court said, "This construction is particularly appropriate where, as here, to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct." *Id.* at 427. See also *United States v. Schmucker*, 815 F.2d 413, 421 (6th Cir. 1987) (definition of mental element under 50 U.S.C. Appx. § 462(a), criminal penalties provision of Military Selective Service Act: "The term 'willfully' . . . require[s] proof of . . . an intentional violation of a known legal duty."); *United States v. Rabb*, 394 F.2d 230, 231-32 (3d Cir. 1968) (same); *United States v. Adames*, 878 F.2d 1374, 1377 (11th Cir. 1989); *United States v. Davis*, 583 F.2d 190, 193 (5th Cir. 1978) (arms export cases).

The *in banc* decision in *United States v. Aversa*, 984 F.2d 493 (1st Cir. 1993), squarely conflicts with the opinion in petitioner Shirk's case. The First Circuit adopted the construction of "willfulness" sought here, and for many of the same reasons. Chief Judge Breyer wrote a concurring opinion, 984 F.2d at 502-03, and Judge Torruella dissented, *id.* at 503-07, solely to emphasize that they would go further in granting relief than the First Circuit majority. Not a single judge agreed with the view taken below in the present case, or by the balance of the circuits which have addressed the issue. In *United States v. Aversa*, 762 F.Supp. 441 (D.N.H. 1991), writing after notices of appeal from the § 5324/5322 structuring convictions had been filed and thus having no power to

grant relief, the trial judge reconsidered these same issues in the wake of *Cheek, supra*, and concluded, "The reasons for requiring a specific intent to violate the law in [such] case[s] are at least as compelling as the reasons referred to in *Cheek*. Reverting to the common law rule that ignorance of the law is no excuse caused a miscarriage of justice in this case." 762 F.Supp. at 447. The same kind of miscarriage occurred here.

Contrary to *United States v. Scanio*, 900 F.2d 485, 489-91 (2d Cir. 1990), and the decisions which follow it, such as the decision below, requiring proof of the intentional violation of a known legal duty is the only way to ensure that there is any element of wrongfulness in the defendant's conduct before it is punished as a felony. Knowledge of the reporting duty imposed by § 5313, as required by the jury instructions given at trial and as held sufficient by the majority of circuits, does not satisfy the "known legal duty" standard, because § 5313 imposes no duty on the bank customer. Unless either the term "willfully" in § 5322(b) or the term "evading" in § 5324(3) is construed to impose an element of knowledge that the *customer's conduct* is improper, then *the customer* is indeed punished for "apparently innocent conduct." *Liparota, supra*.

The due process requirement that a serious crime involve *scienter*, that is, an element of morally wrongful conduct, intentionally and knowingly performed, is not satisfied by the statutory provision that limits convictions to intentional evasion, unless "evade" in turn is construed to require knowledge of the duty not to structure, rather than merely of the bank's duty to report. Otherwise, "structuring" is no more wrongful than choosing to increase one's charitable contributions in December so as

to have more itemized deductions, or to delay (or accelerate) an expense to take advantage of a change in tax bracket or rates, or to limit one's annual IRA contribution to the excludable $2000 limit. Indeed, every "year-end tax tips" publication would be considered a road map to tax evasion, rather than advice for astute personal planning.

The anti-structuring prohibition is civilly as well as criminally enforceable. Compare *id.* § 5321(a)(4) (civil) *with id.* § 5322(b) (criminal). A construction of § 5324 that treats "evade" as if it meant no more than "avoid," as in the jury instructions given in petitioner's case as upheld below, or which treats "willfully" as used in § 5322(b) as if it added nothing to § 5324, leaves the statute, when criminally enforced, without a true *scienter* requirement. In a free country, it cannot be considered morally suspect to wish to keep personal information out of government files. Nor is a concern for financial privacy the only legitimate reason deliberately to keep one's cash deposits lower than $10,000. A person might reasonably be concerned about the possibility of a crime committed against the messenger taking the money to the bank, either in terms of physical safety or of amount of loss risked. An innocent person might also be concerned about others' unfounded suspicions of one's being in an illicit business arising from the handling of so much cash at one time, not to mention the reasonable desire to avoid the inconvenience of an IRS investigation and audit, no matter how baseless.

The respondent has never denied that it is perfectly lawful for a legitimate merchant, such as petitioner Shirk, with a steady cash flow of tens of thousands per week, but well under $10,000 per day received in currency, to *avoid* the filing of CTR's by making more rather than less

frequent bank deposits. It hardly could, given the testimony of its own "expert" witness, the legislative history, the leading treatise, and its own Handbook. According to the treatise:

> the Justice Department does not suggest that it would be a violation of this Subsection (3) for a depositor to arrange his activities so that he never *accumulates* a reportable sum for deposit in a financial institution. As a practical matter, the problems of proof in such a case would be significant. . . . This argument is reinforced by the absence of legislative history which indicates that Congress intended to reach this type of avoidance activity.

J. Villa, Banking Crimes, *supra*, § 6.05[1][c][ii], at 6-65 (referring to U.S. Justice Dept., Handbook on the Anti-Drug Abuse Act of 1986, at 81-87 (1987)).

The facts of petitioner's case, involving a prosecution for "structuring" the legitimate receipts of his lawful business into his own business account, are unique in the annals of prosecution under this law. As the Eleventh Circuit recently recognized, "When a person conducts cash transactions in amounts of less than $10,000 because he or she has a legitimate reason to do so, no conspiracy to structure occurs." *United States v. Brown*, 954 F.2d 1563, 1571 (11th Cir.) (*citing* S.Rep. No. 433, 99th Cong., 2d Sess. 22 (1986)), *cert. denied*, 113 S.Ct. 284 (1992). Under such circumstances, at least, no inference of improper structuring could be drawn from the pattern and amounts of the deposits alone, because the proof would not make out the required "purpose of evading," as opposed to mere "avoiding" of the reporting requirement. As Justice Souter recently has emphasized:

> We do not accept the Government's suggestion . . . that [a revenue statute should be

> broadly construed] because otherwise manufacturers will be able to 'avoid the tax' . . . [If the tax at issue applies to disassembled as well as assembled firearms, f]ailure to pay the tax on such a kit would amount to evasion, not avoidance. In our system, avoidance of a tax by remaining outside the ambit of the law that imposes it is every person's right.

United States v. Thompson/Center Arms Co., 504 U.S. ___, 112 S.Ct. 2102, 119 L.Ed.2d 308, 315 n.4 (June 8, 1992) (plurality opinion). Yet the decision below would deny that lawful option to petitioner Shirk on the basis that his business, formerly deemed exempt from being the subject of currency transaction reporting by its bank, changed its banking practices to make more frequent deposits when the exemption was withdrawn.

Although the claim has been made in a number of recent cases, including by the court below, that the "violation of a known legal duty" definition of willfulness is somehow "unique" to "complex" tax cases, this view is simply unsupportable. As noted above, a wide variety of non-tax *malum prohibitum* crimes involving an intent to violate the requirements of a different body of law employ the same definition. In any event, it is ludicrous to suggest that the anti-structuring laws are less "complex" than the law involved in *Cheek*, which merely requires that a tax return be filed when a person earns more than a certain amount of gross income. At least the proper definitions of "transaction," "structuring," "evading" and "willfully" are not clear under this law. Accordingly, the rule of lenity requires that none of them be construed so as to extend criminal liability where, as here, there is substantial doubt that Congress intended it to exist. See *United States v. Thompson/Center Arms Co.*,

supra, 504 U.S. ___, 119 L.Ed.2d at 319-20 & n.10 (plurality) and *id.* at 320, 323 (concurring opinion) (applying rule of lenity to non-complex tax on manufacture of firearms, because provision is also criminally enforceable).

Congress's choice of the term "evading" in § 5324 is significant in this context, as that term carries with it a large and well-settled body of law from tax evasion prosecutions under 26 U.S.C. § 7201, in which the evasion/avoidance distinction is fundamental. *See* Harry G. Balter, Tax Fraud and Evasion ¶2.01, at 2-2 through 2-9 (5th ed. 1983). Moreover, at the same time it enacted § 5324, Congress created another money laundering offense, 18 U.S.C. § 1956(a)(2)(B)(ii), which penalizes behavior designed to "*avoid* a transaction reporting requirement," but only if engaged in with criminally derived funds. The avoidance/evasion distinction must be given meaning to preserve the obviously intentional difference between these two related statutes.

Nor are the decisions following *Scanio*, such as *Ratzlaf* and the decision below, supported by the 1986 legislative history. Section 5324 was enacted to make clear that the conduct which had been held by some circuits to be unprosecutable under prior law (various combinations of 18 U.S.C. §§ 2, 371 and 1001 with the Bank Secrecy Act provisions imposing duties on financial institutions alone) could be punished. In enacting that provision, however, Congress adopted the *mens rea* provision from 31 U.S.C. § 5322(b), requiring "willfulness" (as well as the "purpose of evading" language) which had already long since been construed (in the Customs declaration cases) to apply the *Pomponio* standard. It is impossible from this history to infer a Congressional intent to change the law adversely, in this respect, to criminal defendants.

Some of the cases discuss parts of the Congressional reports dealing with making the *act* of structuring illegal for the first time as if they dealt with the issue of intent. See, *e.g.*, *Brown*, *supra*, 954 F.2d at 1568-69. Rather, as recognized by the Tenth Circuit, "criminal intent is not specifically addressed" in the legislative history of the 1986 amendments to the Bank Secrecy Act. *United States v. Dashney*, 937 F.2d 532, 538 (10th Cir.), *cert. denied*, 112 S.Ct. 402 (1991). In any event, legislative history may not be invoked to defeat the operation of the rule of lenity in the construction of a criminal statute. *United States v. R.L.C.*, 503 U.S. ___, 117 L.Ed.2d 559, 573-77 (March 24, 1992) (Scalia, J., concurring in the judgment, with Kennedy & Thomas, JJ.). Where, as here, there is legitimate doubt as to the meaning of the term "willfully" in § 5322(b) or the term "evade" in § 5324, then that doubt must be resolved in favor of the criminally accused. *E.g.*, *Liparota*, *supra*.

The error in instructing on the intent element in this case was severely prejudicial. Certainly, the evidence viewed in the light most favorable to the government showed that petitioner Shirk knew of the bank's reporting obligations and deliberately conducted the cash portions of his banking business so as not to trigger the filing of CTRs. But no evidence showed that Shirk knew structuring was illegal, rather than being a lawful form of avoidance, akin to tax planning. Indeed, when his business was searched, and an accumulation of smaller denomination bills was found in his safe, Shirk told an agent that he intended to deposit it in amounts less than $10,000 each, and asked whether that were illegal. 3d Cir. Appx. A256-57. Most important, the district court appears to have acknowledged at least a reasonable doubt as to

petitioner's "willfulness," in the "known legal duty" sense. Appx. E9 (judgment of sentence).

For all of these reasons, the writ of certiorari should be granted. Congress did not intend the conduct proven in this case to be treated as a crime, and no crime was proven. The jury instructions presented this case on a prejudicially low standard of criminal intent. At least a new trial is required. On a proper interpretation of the intent element of this offense, the government failed to prove that petitioner willfully structured any currency transactions with any financial institution for the purpose of evading a reporting requirement. For all these reasons, this Court should grant this petition for certiorari, consolidate the case with *Ratzlaf, supra,* and reverse the judgment of the United States Court of Appeals for the Third Circuit to the extent that it affirmed petitioner Shirk's convictions for willfully structuring currency transactions with the intent to evade a reporting requirement.

b. This Court Should Also Grant the Petition to Address the Related Question of the Meaning of "transaction" Under the Anti-Structuring Law.

The government's "structuring" case against petitioner Shirk was based on evidence showing a pattern of deposits including cash of less than $10,000 each, but the evidence showed that Shirk was in a large-volume wholesale and retail business, which had total bank deposits of about $500,000 per week during the relevant time period, 95% or more of them in the form of checks (to which the CTR regulations do not apply). In reality, this prosecution was based on the theory that *failure* to deposit more than $10,000 at a time, whenever the defendant *could have* structured his affairs so as to do so, ought to be punished.

The simple answer to the government's theory, invented for this case because the facts do not make out structuring under any precedent, is that Congress has not made such conduct criminal. This Court should grant the writ in this case to address this question as well.

How much of petitioner's sales volume was in cash in the days between one deposit and another the government did not establish, either exactly or approximately. What the evidence did show, however, was that in the relevant time period Shirk stashed over $1.6 million in $100 bills in a safe, and there was no evidence presented that the cash deposits at issue included *any* hundreds.[7] In the absence of proof that the cash income between one bank deposit date and another, not including any hundred dollar bills received, exceeded $10,000 while less than that was deposited, or that a pool of cash funds to be deposited exceeding $10,000 otherwise existed of which the charged deposits were part, the offense of structuring transactions to evade a reporting requirement was not made out. In the absence of evidence of the rate of cash flow, of the breaking up of transactions or the holding back of accumulated funds,[8] such proof falls woefully

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[7] The government placed in evidence xerox copies of the front sides of the deposit slips, omitting the reverse sides which would have shown the breakdown of the cash by denominations, as determined by the teller at the time of counting out the deposit.

[8] The evidence showed that petitioner Shirk, for reasons of his own, held back all the hundred dollar bills, but there was no evidence that he *ever* intended to deposit them or the accumulated coins. That conduct is not covered by the anti-structuring law, which is *not* a "mandatory deposit" law. The $80,680 in smaller denominations found in the search of petitioner's office was not the subject of Count Nine or Ten, nor can its existence

short. To hold otherwise would be to expand this statute far beyond the words chosen by Congress, as well as beyond the purpose intended to be accomplished.

The regulations shed no pertinent light on the meaning of "transaction," "evading" or "willfully"; the Treasury Department does attempt to define "structuring," at least in part, in 31 C.F.R. § 103.11(p) (1990), formerly § 103.11(n) (1989). That definition, however, quoted in full in the Statutes Involved, is essentially useless. Using this "definition" in conjunction with § 5324(3) results in the complete elimination of "structuring" as a separate element, since the regulation defines as "structuring" any conduct done for the statutorily prohibited purpose of "evading" a reporting requirement; the definition also essentially negates the statutory requirement that what is structured must be "a transaction."[9] See *United States v. Thompson/Center Arms Co., supra,* 504 U.S. ___, 119 L.Ed.2d at 315 (plurality) (treating as necessarily erroneous a statutory construction under which certain "additional language would be redundant").

In petitioner's case, proving the pattern of deposits without relating that evidence to the cash flow of the business was not enough, because it invited conviction on the basis of speculation. As this Court put it, discussing the analogously circumstantial "net worth method" used to prove income tax evasion, there is a "great danger that

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prove whether the regular cash deposits charged in Count Nine came from any accumulation rather than from current receipts.

[9] To the extent that this regulation attempts to impose a broader rule than sought here, it is not only virtually unintelligible, but also inconsistent with the statute.

the jury may assume that once the Government has established the figures in its net worth computation, the crime of tax evasion automatically follows. . . . [B]are figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them." *Holland v. United States*, 348 U.S. 121, 127-28 (1954).[10]

A pattern of deposits of less than $10,000, even a suspicious pattern, cannot alone constitute proof beyond reasonable doubt of structuring. "The 'evading' of which section 5324(3) speaks is the attempt *to split up a cash hoard* in such a way as to defeat the government's efforts to identify money launderers." *United States v. Davenport*, 929 F.2d 1169, 1173 (7th Cir. 1991) (Posner, J.; emphasis added). The prosecution evidence on the charges in this indictment is at least equally consistent with the theory that Shirk deposited amounts of cash less than $10,000 as he accumulated them, while collecting the $100 bills in the safe,[11] as it is with the speculative theory of guilt on which the government sought and obtained its verdicts and the affirmance below.

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[10] In a "net worth" case, the government's special burden is often to *disprove* the theory of a pre-existing "cash hoard." *See* H. Balter, Tax Fraud and Evasion ¶13.03[4][b][i], at 13-22 (5th ed. 1983). In a structuring case, the government's burden is the opposite – to show such a hoard's existence.

[11] The evidence showed that the $1.6 million in $100 bills and $700,000 in coins seized from safes at Ron Shirk Shooters' Supplies constituted a true, old-fashioned "cash hoard" of savings, not intended for deposit at any time. Petitioner Shirk's statement that he was holding certain cash for eventual deposit in amounts of $10,000 or less referred specifically to a separate $80,000 in smaller bills, which the indictment did not charge him with structuring.

All of the other post-1986 currency transaction structuring cases involved clearly identifiable, pre-existing pools of more than $10,000, all of which the defendants plainly intended to deposit or exchange. See *United States v. Brown, supra* (single withdrawal of $18,000 aborted and changed to two withdrawals upon receipt of teller's advice that CTR would be filed); *United States v. Dashney, supra* (eleven cashier's checks purchased on same day from $92,400 cash gambling winnings); *United States v. Davenport, supra* (deposits over two weeks totaling $81,500 from admitted $100,000 cash hoard, although true source of hoard unkown); *United States v. Hoyland,* 914 F.2d 1129 (9th Cir. 1990) (same-day split deposits); *United States v. Scanio, supra* (more than $10,000 presented at bank, then split for deposit on consecutive days upon receiving advice from teller). See also *United States v. Donovan,* 984 F.2d 507 (1st Cir. 1993) (bank officer made unreported cash deposits for associate in amounts far exceeding $10,000 each); *United States v. Ratzlaf,* 976 F.2d 1280 (9th Cir. 1992), *cert. granted,* No. 92-1196 (April 26, 1993) ($160,000 in cash to pay off gambling marker taken to series of banks to obtain cashier's checks); *United States v. Gibbons,* 968 F.2d 639, 643-45 (8th Cir. 1992) (customer requested six cashier's checks, rather than one totaling over $52,900, upon being advised of CTR requirement); *United States v. Rogers,* 962 F.2d 342 (4th Cir. 1992) (over $149,000 in cash converted into 18 cashier's checks to pay for house); *United States v. Daniel,* 957 F.2d 162 (5th Cir. 1992) (per curiam) (arrangement for $17,500 cash loan from bank to be disbursed in two checks at two different branches on same day); *United States v. Nall,* 949 F.2d 301 (10th Cir. 1991) ($50,000 cash to settle on house broken down into smaller amounts).

This Court therefore should grant the writ of certiorari in this case and consolidate with *Ratzlaf, supra,* not only to consider in a fuller context the meaning of the mental element of this offense, but also to consider the meaning of its *actus reus,* "structuring" of "any transaction." The government's evidence on the structuring counts in this case fell short of proving any offense cognizable under 31 U.S.C. § 5324(3). On remand, the convictions must be reversed.

2. This Court should resolve the uncertainty in the courts of appeals on the question of how much deference to allow a district judge's reasonable conclusion, supported by a statement of reasons, that a downward departure from the otherwise applicable guideline sentence is warranted.

The district judge imposed a sentence of nine months' imprisonment, departing downward for a combination of four stated reasons, from guidelines that the court of appeals found to demand incarceration for between 24 and 30 months. The reversal of this reasonable sentence typifies the hostile approach to downward departures that has been exhibited by too many appellate judges and fails to give proper deference to the district court's discretion in exercising its power under the Sentencing Reform Act. Certiorari should be granted to review this important issue of how the courts of appeals should envision, and how they will carry out, their duty under 18 U.S.C. § 3742(e) to oversee downward departure sentences.

The decision of the court below, in keeping with many others, sends a clear message: the district judges will be kept on a short leash in the exercise of their

sentencing power. Instead, this Court should mandate a more restrained review of reasonable exercises of district court discretion to depart from guideline ranges which, because of mitigating circumstances not adequately considered by the Commission, 18 U.S.C. § 3553(b), appear to the sentencing judge to call for imposition of sentences which are "greater than necessary," *id.* § 3553(a), to fulfill the statutory purposes of punishment.

Judge Caldwell offered a combination of four reasons for his conclusion that petitioner Shirk's currency structuring violations fell outside the "heartland," USSG ch. 1A, ¶4(b) (p.s.), of conduct punishable under USSG § 2S1.3. *See* Appx. B31; Appx. E9; Appx. F. The panel's review of the downward departure in this case consists solely of a close and literal analysis of each of these reasons in isolation. Finding each, on an explicitly plenary review, Appx. B31, to have been adequately considered by the Commission in the formulation of the Guidelines themselves and therefore to be an unlawful basis for departure, the panel sustained the government's appeal. Appx. B30-33, B35. Some panels in the courts of appeals, supported by a growing body of scholarly commentary, have suggested a very different approach.

Chief Judge Sloviter's opinion in *United States v. Lieberman*, 971 F.2d 989, 994-999 (3d Cir. 1992), for example, discusses with approval the analysis presented in the growing body of literature which emphasizes the discretion and flexibility granted sentencing judges under the Guidelines regime. The opinion cites articles by Judges Becker, Selya, Lay and Frankel, and by Yale Law School Professor Daniel J. Freed, editor of the Federal Sentencing Reporter; 971 F.2d at 995-96, 999 n.10. Many more could be added to that bibliography. See, *e.g.*, Stephen J. Schulhofer, *Assessing the Federal*

Sentencing Process: the Problem Is Uniformity, Not Disparity, 29 Am.Crim. L.Rev. 833 (1992). There, Professor Schulhofer writes, mincing no words:

> Implementation of the departure provisions has fallen far short of . . . congressional expectations for flexibility within a structured framework. . . . This largely unexpected development appears to have a diversity of causes.
>
> * * * *
>
> Case law on the scope of the departure power is not the only source of this problem, but overly stringent appellate review has reinforced and extended it. The appellate decisions are not all of a piece. A few permit the departure mechanism to work in the way Congress and the Commission intended. . . . But decisions of this sort are a distinct minority.
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> * * * *
>
> The superficial analysis and strained logic of so many appellate decisions suggests that a broader concern is at work: a general view that departures are a threat to the Guidelines system, and that appellate judges must keep a tight rein on the remaining pockets of district court discretion in order to keep departures to a minimum.
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> . . .
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> * * * *
>
> This phenomenon is especially ironic because the federal judiciary has been in the forefront of attacks on the effort to restrict judicial discretion. Yet the judges themselves bear much of the responsibility for inflexibility in the sentencing system. . . . Through such decisions, the appellate courts have become a major source of undue rigidity and excessive uniformity in the federal sentencing process.

29 Am.Crim.L.Rev. at 862, 863, 869-70.

In considering the sentencing judge's statement of reasons, the panel below failed to take into account that the district court was speaking extemporaneously and therefore may have expressed itself with imperfect precision. Obviously, as the panel noted, the acquittal on the tax counts, as such, is immaterial with respect to the CTR convictions. *See* Appx. B31. Rather than discount or dismiss the factor on that basis, the court below should have asked the question, what could the district court logically have meant by that comment that would make its judgment sustainable? Could the judge's point fairly be restated so as to be more tenable? Here, Judge Caldwell may well have meant that he accepted the jury's verdict as a basis for finding no intent by petitioner to evade taxes through his structuring activity.[12] The court declared this to be a "difficult" and "a most unusual" case, with which the court reminded all concerned it had "a great amount of familiarity." Appx. F1. At most, the departure judgment should have been remanded for clarification, not reversed outright.

The relevance of those factors, and the failure of the Commission adequately to take them into consideration previously, is dramatically illustrated in a proposed amendment to the present Guideline 2S1.3, delivered to Congress on May 1, 1993, and due to replace the current

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[12] Likewise, the lower court's comment on petitioner's lack of criminal intent may have been intended to refer more to his lack of any ulterior motive to promote or conceal any *other* criminal activity, while his comment on Mr. Shirk's "exposure" to a "substantial forfeiture" seems more likely to have referred to the defendant's fear of losing his entire business, as the government had threatened, than to the actual forfeiture amount that he negotiated.

version on November 1, 1993, unless legislatively altered. 58 Fed.Reg. 27148, 27157 (May 6, 1993). In its Report to the Commission (Oct. 14, 1992), on the basis of which this amendment was approved, the Commission's Working Group noted that "departures have played a significant role in sentencing for monetary reporting violations." Report, at 25. In Fiscal Year 1991, 13 of 15 departures in these cases for reasons other than "substantial assistance" were in cases where, as here, "the defendant neither knew nor believed that the funds were criminally derived property." *Id.* at 26. The Working Group noted that departures in such cases were significantly more frequent than in guideline sentencing generally. *Id.*

In a case involving legitimate proceeds, and in which the defendant had no purpose of tax evasion – the very factors identified by Judge Caldwell here as justifying a nine month sentence – the offense level under the Commission's new proposal would be 6, "the typical offense level for a regulatory offense." Working Group Report, at 4. This offense level carries a guideline range of *probation to six months' confinement.* Under the amendment, petitioner Shirk's sentence would go from being a downward departure to being 50% higher than the top of the range. The official "reason for the amendment" is "to assure greater consistency of punishment for similar offenses and greater sensitivity to indicia of offense seriousness." 58 Fed.Reg. at 27157. Curiously, "representatives of [the Department of Justice] reported [to the Working Group] that, as far as they knew, prosecutors did not bring cases involving structuring of lawfully derived funds." Working Group Report, at 24. That comment alone strongly suggests that this case, which is of just that type, does not fall within the "heartland."

In all appellate review of guideline sentencing, "due deference" must be given "to the district court's application of the guidelines to the facts." 18 U.S.C. § 3742(e). Here, Judge Caldwell's assessment of the case as a whole, while not ideally articulated, properly recognized factors taking petitioner Shirk's convictions out of the "heartland" of seriousness of most offenses covered by this offense level. As stated by the Senate Committee in the authoritative report on the Sentencing Reform Act:

> Regardless of the grounds for appeal, the statement of reasons should not be subjected to such legalistic analysis that will make judges reluctant to sentence outside the guidelines when it is appropriate or that will encourage judges to give reasons in a standardized manner.

S.Rep. No. 98-225, 98th Cong., 1st Sess. 80 (1983). The rejection by the court below of the district court's reasoning is inconsistent with Congressional intent, with the proper role of the court of appeals in the guideline sentencing process, and with the Commission's own most recently expressed views of where the "heartland" lies, and what an appropriate level might be, for such offenses. For all these reasons, the writ of certiorari should be granted to review and reverse the court of appeals' disposition of the government's cross-appeal.

CONCLUSION

For each of the foregoing reasons, petitioner RONALD P. SHIRK prays that this Court grant his petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit affirming his conviction but vacating the

downward departure sentence and remanding for resentencing.

Respectfully submitted,

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STEPHEN ROBERT LACHEEN
ANNE M. DIXON
Attorneys for Petitioner

May 17, 1993.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-7123 and 92-7174

UNITED STATES OF AMERICA
Appellant in No. 92-7174

v.

RONALD P. SHIRK
Appellant in No. 92-7123

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE
DISTRICT OF PENNSYLVANIA
(Crim. No. 90-294)

Present: Greenberg, Cowen and Weis, *Circuit Judges*

AMENDED JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel October 5, 1992.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 3, 1992, be, and the same is hereby affirmed as to Ronald P. Shirk's conviction but the cause is remanded to the District Court for resentencing consistent with the opinion of this Court including any calculation of the appropriate sentence by reason of any

facts or law which have not been considered by the opinion.

ATTEST:
/s/ P. Douglas Sisk
Clerk

Dated: March 31, 1993

Certified as a true copy and issued in lieu of a formal amended mandate on March 31, 1993.

Teste: /s/ P. Douglas Sisk
Clerk, U.S. Court of Appeals for the Third Circuit.

APPENDIX B

**UNITED STATES of America,
Appellant in No. 92-7174,**

v.

**Ronald P. SHIRK, Appellant
in No. 92-7123.**

Nos. 92-7123, 92-7174.

United States Court of Appeals,
Third Circuit.

Argued Oct. 5, 1992.

Decided Dec. 3, 1992.

As Amended Feb. 16, 1993.

Stephen Robert LaCheen (argued), Anne M. Dixon, LaCheen & Associates, Philadelphia, PA, James W. Evans, Mette, Evans & Woodside, Harrisburg, PA, for appellant cross appellee.

James J. West, U.S. Atty., Dennis C. Pfannenschmidt (argued), Asst. U.S. Atty., Barbara E. Kittay, Sarah Elizabeth Jones, Susan R. Klein, U.S. Dept. of Justice, Harrisburg, PA, for appellee cross appellant.

Before: GREENBERG, COWEN and WEIS, Circuit Judges.

OPINION OF THE COURT

COWEN, Circuit Judge.

On August 14, 1991, a jury convicted defendant Ronald P. Shirk on two counts of willfully structuring currency transactions in violation of 31 U.S.C. §§ 5324(3)

(1988) and 5322(b) (1988). Departing downward from the Sentencing Guidelines range, the district court sentenced Shirk to nine months imprisonment. He appeals, asserting that we should vacate his conviction because: (1) the Government's proof was insufficient; (2) the indictment was defective; (3) the jury instructions were erroneous; and (4) the district court admitted improper expert testimony from a Government witness. In the alternative, Shirk asks us to remand with instructions for calculating a further reduced sentence under the Guidelines. The Government cross-appeals, asserting that we should remand for resentencing within the range prescribed by the Guidelines.

We will affirm Shirk's conviction and deny his request for a remand with instructions for a reduced sentence. We will grant the Government's request for a remand with instructions for resentencing within the applicable guideline range.

I.

In 1968, while Shirk was a full-time police officer, he and his wife Bonnie began operating a gun dealership from their home in Lebanon, Pennsylvania. Shirk's dealership, Ron Shirk's Shooter Supplies, has since evolved into one of the nation's largest wholesale firearm distributorships.

On February 14, 1990, Internal Revenue Service agents acting on a tip executed a search warrant at Shirk's business premises, resulting in the seizure of business records from 1984 to 1987. During the search, one of the agents asked Shirk if he kept any currency on the

premises. He responded that one to two million dollars was stored in a safe in the basement. After obtaining additional search warrants, the agents seized $1,481,100 in $100 bills, 700 $20 gold pieces, and 3,748 silver dollars from the basement safe. Also seized from a safe located on the main floor was $149,900 in $100 bills, $80,680 in smaller denomination bills, and several hundred gold coins. Shirk informed one of the agents that the $80,680 in smaller bills was working capital for the business. Shirk stated that he was going to put this money in the bank, but that he intended to deposit it in amounts under $10,000 so that no currency transaction reports ("CTRs") would be filed with the IRS. Shirk asked the agent if that were illegal.

Following an investigation, a federal grand jury returned an eleven count indictment on October 30, 1990. The indictment charged Shirk with income tax violations (counts 1-8), structuring currency transactions for the purpose of evading reporting requirements (counts 9-10), and criminal forfeiture (count 11).

At trial, the government presented bank records as evidence in support of the structuring charges. The records showed that from January 1, 1987 to March 5, 1989, Shirk made forty-four deposits at Lebanon Valley National Bank in currency amounts over $10,000. During this period, Shirk had an exemption from the bank allowing him to deposit up to $20,000 without having a CTR filed. During the week of March 13, 1989, the bank informed Shirk that his exemption had been revoked. From that time until the IRS agents executed their search warrant on February 14, 1990, Shirk made approximately

88 currency deposits.[1] None of these deposits exceeded $10,000.

Records introduced at trial also showed that on February 6, 1990, Shirk made a sale to a customer for which he received $30,000 in cash. There was no corresponding $30,000 deposit into Shirk's business account. However, currency deposits of $9,000, $7,000, $9,300, and $7,000 were made on February 7, 8, 12, and 13, 1990 respectively.

Finally, the evidence established that three money orders were purchased on September 6, 8, and 13, 1989 in the amounts of $9,500, $9,800, and $9,500, respectively. These money orders were signed "Ron Shirk and Bonnie Shirk", and were presented together by Shirk on or about September 26, 1989 to purchase property at a real estate closing.

Gerald MacReady, an IRS agent, testified for the government as an expert in financial investigations and money laundering. He explained to the jury the nature of a CTR and the types of information regarding currency transactions that a bank is required to disclose. MacReady also explained the term, "structuring." He opined that the currency deposits made by Shirk after the bank revoked his CTR filing exemption were structured. He also offered his opinion that the three money order purchases in September 1989 were structured.

Timothy Sandoe, a vice-president at Lebanon Valley National Bank, also testified for the Government. He stated that when he became Shirk's account officer, Shirk

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[1] Most of the deposits were made at Lebanon Valley National Bank. Some were made at Jonestown Bank.

usually made only one very large deposit per week, either on Sunday night or on Monday morning. Sandoe recalled recommending that Shirk make more frequent deposits so he could earn more interest, and so the bank could avoid having to process a single huge deposit on Monday mornings. Sandoe testified that Shirk eventually agreed to make more than one weekly deposit. At trial, Shirk sought to establish that he began making more frequent deposits in amounts of less than $10,000 on the basis of Sandoe's recommendations, and not for the purpose of evading federal reporting requirements.

On August 14, 1991, the jury convicted Shirk on the two structuring counts. Shirk was acquitted on the eight tax counts. The forfeiture verdict on count eleven was sealed pending formalization of settlement discussions between the parties. This led to a stipulation for settlement, and on March 13, 1992 the court dismissed count eleven. The district court entered a final order of forfeiture on March 17, 1992.

Following conviction, the probation officer filed a presentence report recommending that Shirk's base offense level under the Sentencing Guidelines be decreased by two levels for acceptance of responsibility. After the report was issued, however, the government located $360,900 in $100 bills in a safety deposit box in the name of Bonnie Shirk. According to the probation officer, Shirk claimed that the money located in the deposit box had been joint personal assets until transferred to Bonnie Shirk in November 1990. Additional investigation led the government to yet another safety deposit box in the name of Bonnie Shirk containing $256,000 in $100 bills. The probation officer then filed a

memorandum with the district court recommending that Shirk not receive a downward adjustment for acceptance of responsibility. The memorandum reasoned that Shirk had provided misleading information regarding the transfer of assets to his wife in a financial affidavit.[2] The memorandum recommended no upward adjustment for obstruction of justice, however, on the grounds that Shirk's falsehoods were not material. App. at 555.

On March 3, 1992, at sentencing, the district court calculated Shirk's base offense level at thirteen pursuant to Guidelines § 2S1.3(a)(1)(A). Finding that Shirk had structured funds totalling in excess of $600,000, the district court figured in a four-level increase pursuant to Guidelines §§ 2S1.3(b)(2) and 2S1.1(b)(2)(E). The court accepted the probation officer's recommendation that Shirk not receive either a downward adjustment for acceptance of responsibility or an upward adjustment for obstruction of justice. Although the final offense level of seventeen called for a prison sentence of 24-30 months, the district court, relying on Guidelines § 5K2.0,[3] departed from the recommended range and sentenced Shirk to nine months imprisonment. The district court reasoned that Shirk's case was "atypical" mainly because he was acquitted of criminal tax charges and was subject to a substantial financial forfeiture. App. at 240.

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[2] Prior to the filing of its initial presentence report, the probation office had received an affidavit stating that Shirk and his wife held $7,800 cash in joint assets. Shirk left blank a question asking whether he had transferred any assets valued at greater than $1,000 during the past three years.

[3] This section is a policy statement discussing appropriate grounds for departures.

Shirk mounts several challenges to his conviction on appeal. He claims that the proof at trial was insufficient to convict him and that the Government's indictment was defective for lack of specificity. He also maintains that the district court's jury instructions were inadequate and that its admission of IRS agent MacReady's expert testimony was plain error. With respect to his sentence, he contends that, because his offense was only technical, the district court misinterpreted the Sentencing Guidelines by applying base offense level thirteen, rather than base level five. He also contends that the district court enhanced his offense level to seventeen based on an unsubstantiated factual finding that he structured funds in excess of $600,000.

On cross-appeal, the Government claims that the district court erred in departing downward from the applicable guideline range. The Government also asserts that the Guidelines require a further enhancement of Shirk's offense level for obstruction of justice.

II.

We first address Shirk's claim that the Government's proof is insufficient. The standard of review for a claim of insufficient proof is whether substantial evidence supports the jury's verdict. *United States v. Sturm*, 671 F.2d 749, 751 (3d Cir.) (per curiam), *cert. denied*, 459 U.S. 842, 103 S.Ct. 95, 74 L.Ed.2d 86 (1982). In deciding this issue, we consider the evidence and all reasonable inferences in the light most favorable to the government. *Id.*

Title 31 U.S.C. § 5313(a) and applicable federal regulations require banks to file a CTR whenever more than

$10,000 is deposited, withdrawn, exchanged, paid, or transferred, unless the transaction is exempted in accordance with the regulations. 31 U.S.C. § 5313(a) (1988); 31 C.F.R. § 103.22 (1992). Shirk was convicted of violating 31 U.S.C. § 5324(3), which provides: "No person shall for the purpose of evading the reporting requirements of section 5313(a) . . . structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions." Willful violations of section 5324(3) are made criminally punishable by 31 U.S.C. § 5322(a), (b).

Shirk contends that the inadequacy of the proof against him stems from the Government's mistaken interpretation of what constitutes a structured "transaction" under the anti-structuring statute. Shirk asserts that the Government failed to understand that structuring a "transaction" under 31 U.S.C. § 5324(3) means artificially breaking down an identifiable pool of funds, or cash hoard, of more than $10,000 into smaller component amounts. As a result, says Shirk, the Government failed to prove that the deposits charged in count nine were artificially broken down pieces of a pre-existing pool of funds equalling more than $10,000. According to Shirk, this failure of proof requires reversal of his conviction.

Neither the statute nor the regulations require the Government to prove the existence of a cash hoard in excess of $10,000 to obtain a conviction. In defining the term, "structure," the regulations provide that "a person structures a transaction if that person . . . conducts or attempts to conduct one or more transactions in currency, in any amount, at one or more financial institutions, on one or more days, *in any manner*, for the purpose of

evading the reporting requirements." 31 C.F.R. § 103.11(p) (1992) (emphasis added).

> "In any manner" includes, *but is not limited to,* the breaking down of a single sum of currency exceeding $10,000 into smaller sums, including sums at or below $10,000, or the conduct of a transaction, or series of currency transactions, including transactions at or below $10,000. The transaction or transactions need not exceed the $10,000 reporting threshold at any single financial institution on any single day in order to constitute structuring within the meaning of this definition.

Id. (emphasis added).

As the regulations make clear, the conduct proscribed "is not limited to" the breaking down of an identifiable cash hoard of greater than $10,000. Rather, the law prohibits currency transactions made "in any amount . . . in any manner, for the purpose of evading the reporting requirements." *Id.* Thus, to convict Shirk, the government had to prove only that Shirk willfully made deposits of $10,000 or less for the purpose of evading the federal reporting requirements. It did not have to prove that his deposits were artificially constructed pieces of a specific pool of cash equalling more than $10,000.

Applying the proper definition of a structured "transaction," we find sufficient evidence from which a rational jury could have found Shirk guilty beyond a reasonable doubt. The Government introduced records showing that Shirk made more than forty deposits exceeding $10,000 during the one and a quarter years that he was exempt from CTR filing requirements, but no

deposits exceeding $10,000 during the year after his exemption was revoked. Based on the evidence that Shirk began altering the amount of his cash deposits at approximately the same time that the bank informed him he was no longer exempt from the reporting requirements, the jury reasonably could infer that he structured his cash deposits in amounts of less than $10,000 specifically for the purpose of evading the reporting requirements.

Shirk's own statements support this conclusion. While his business premises were being searched, Shirk told an agent that he intended to deposit $80,680 in business capital in amounts under $10,000 so that no CTRs would be filed with the Internal Revenue Service. Given Shirk's admission that he was planning to structure future deposits in amounts under $10,000 for the purpose of avoiding the CTR filing requirements, the jury reasonably could infer that he had structured his prior deposits of less than $10,000 for the exact same reason.

Shirk argues that the evidence adduced at trial comports as much with his theory that he repeatedly deposited amounts of cash under $10,000 for legitimate business reasons, as with the government's theory that he deposited less than $10,000 to evade federal reporting requirements. True or not, this argument misses the point. Whether Shirk structured his deposits under $10,000 for legitimate reasons, or to evade the reporting requirements, was a question for the jury. Our function is therefore limited: we must uphold the jury's verdict if we find, as we do, that substantial evidence supports it.

III.

Having clarified an important element of proof required for a structuring conviction, we now address whether the indictment identified this and other elements with sufficient specificity. Count nine charges that Shirk, in violation of 31 U.S.C. §§ 5324(3) and 5322(b),

> did knowingly and willfully for the purpose of evading the reporting requirements of Title 31, United States Code, Section 5313(a) and the regulations promulgated thereunder, structure, caused to be structured, assist in the structuring, and attempt to structure and assist in the attempted structuring of transactions with one or more domestic financial institutions, as part of a pattern of illegal activity involving more than $100,000 in a 12 month period, as more particularly described below. . . .

App. at 9. There follows a list of ninety cash deposits specified by date and dollar amount. Count ten contains similar language, except the listed transactions are three money order purchases specified by date, dollar amount, and the bank at which the money orders were purchased.

Shirk first argues that the indictment lacks specificity because it fails to identify a particular "transaction" of more than $10,000 that was artificially constructed, or "structured," into smaller amounts of $10,000 or less. This argument has its roots in Shirk's mistaken assumption that the Government was required to prove the existence of a structured pool of funds in excess of $10,000 to win a conviction. Our definition of a structured "transaction" undermines this challenge to the indictment. Because the Government did not have to prove that Shirk structured a

preexisting cash pool of more than $10,000, it did not have to identify any such cash pool in the indictment.[4]

Shirk also argues that counts nine and ten fail to specify whether the listed deposits and money order purchases are intended to describe the charged structured "transactions" or the charged "pattern" of criminal activity. He adds that count nine is defective because it fails to name the domestic financial institutions at which the ninety cash deposits were allegedly made. These arguments lack merit.

An indictment is sufficient if it includes the elements of the offense intended to be charged, apprises the defendant of what he or she must be prepared to meet at trial, and enables the defendant to show with accuracy to what extent he or she may plead an acquittal or conviction as a bar to subsequent prosecution. *Russell v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 1047, 8 L.Ed.2d 240 (1962); *United States v. Rankin*, 870 F.2d 109, 112 (3d Cir.). Generally, an indictment may track the language of the statute, as long as "those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590 (1974)

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[4] Because each count of the indictment refers to a single plan of structuring, of which each specified transaction was a component part, Shirk's claim that the indictment suffers from duplicity also fails. *See Blockburger v. United States*, 284 U.S. 299, 302, 52 S.Ct. 180, 181, 76 L.Ed. 306 (1932) (stating that "when the impulse is single, but one indictment lies, no matter how long the action may continue") (citation omitted).

(quoting *United States v. Carll*, 105 U.S. 611, 26 L.Ed. 1135 (1882)). We have stated that "no greater specificity than the statutory language is required so long as there is sufficient factual orientation to permit the defendant to prepare his defense and to invoke double jeopardy in the event of a subsequent prosecution." *United States v. Olatunji*, 872 F.2d 1161, 1166 (3d Cir.1989) (quoting *Rankin*, 870 F.2d at 112).

Counts nine and ten of Shirk's indictment comply with the requirements of notice and specificity outlined above. Both counts closely and unambiguously track the language of the anti-structuring statute, and charge each element of the underlying offense. *See* 31 U.S.C. §§ 5324(3), 5322(b). The indictment also sets forth specific facts relevant to each offense, including the dates and dollar amounts of the ninety cash deposits and three money order purchases that the Government alleged to be structured. Count ten also names the bank at which the money orders were purchased. This confluence of statutory language and specific factual allegations satisfies Fed.R.Crim.P. 7(c) and minimal constitutional standards of sufficiency. *See Olatunji*, 872 F.2d at 1168 (tracking language supplemented by specific allegations of criminal activity was sufficient). Nothing further is required.[5]

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[5] Also lacking merit is Shirk's argument that count ten is defective because it fails to identify transactions sufficient in amount to constitute the charged "pattern of illegal activity involving more than $100,000 in a 12 month period." Although Shirk is correct that the money order purchases listed in count ten total less than $100,000, participation in a pattern of illegal activity involving more than $100,000 in a 12 month period is

IV.

We next consider Shirk's claim that the district court's charge to the jury set forth a prejudicially low standard of criminal intent. Violations of the prohibition against structuring are criminally punishable only if done "willfully." 31 U.S.C. §§ 5322(b), 5324(3). Shirk contends that the jury could convict him of "willfully" violating the prohibition against structuring only if the Government proved, beyond a reasonable doubt, that he knew structuring is illegal. Shirk argues, therefore, that the district court erred by failing to instruct the jury that knowledge of illegality is required for a conviction.

The *mens rea* required for a conviction under the anti-structuring statutes presents a question of first impression in this circuit. As Shirk acknowledges, however, courts of appeals reaching this issue uniformly have concluded that a conviction for structuring does not require proof that the defendant knew his or her conduct is illegal. *See, e.g., United States v. Rogers*, 962 F.2d 342, 344-45 (4th Cir.1992); *United States v. Brown*, 954 F.2d 1563, 1568-69 (11th Cir.), *cert. denied*, ___U.S.___, 113 S.Ct. 284, 121 L.Ed.2d 210 (1992); *United States v. Dashney*, 937 F.2d 532, 538-40 (10th Cir.), *cert. denied*, ___ U.S.___, 112 S.Ct. 402, 116 L.Ed.2d 351 (1991); *United States v. Hoyland*, 914

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not an element of the underlying offense of structuring; it is an element of sentencing enhancement under 31 U.S.C. § 5322(b). Because Shirk's sentence falls within the more lenient sentencing parameters of 31 U.S.C. § 5322(a), which does not require proof of a pattern of illegal activity involving more than $100,000, Shirk cannot claim prejudice from the Government's failure to adequately specify such a pattern.

F.2d 1125, 1128-29 (9th Cir.1990); *United States v. Scanio*, 900 F.2d 485, 489-91 (2d Cir.1990). For example, the Court of Appeals for the Second Circuit held in *Scanio* that the "willfulness" requirement is met by proof that the defendant "(1) knew that the bank was legally obligated to report currency transactions exceeding $10,000 and (2) intended to deprive the government of information to which it is entitled." *Scanio*, 900 F.2d at 491; *accord Brown*, 954 F.2d at 1568.

Our analysis of the *mens rea* under the anti-structuring statutes begins with the statutory language. *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 68, 102 S.Ct. 1534, 1537, 71 L.Ed.2d 748 (1982). Structuring a transaction is unlawful under 31 U.S.C. § 5324(3) if it is done "for the purpose of evading the reporting requirements of section 5313(a)." On the one hand, a defendant cannot structure a transaction "for the purpose" of evading legal reporting requirements unless he or she knows that such reporting requirements exist.[6] On the other hand, a defendant can structure transactions "for the purpose" of evading reporting requirements without knowing that the law prohibits such structuring.

Title 31 U.S.C. § 5322(b), which imposes criminal penalties on persons who "willfully" violate section

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[6] Judge Greenberg would hold that a defendant can structure a transaction unlawfully if he is aware of the reporting requirements even though he does not know that they are derived from law. *See United States v. Dollar Bank Money Market Account*, 980 F.2d 233 (3d Cir.1992). Of course, this view does not preclude him from joining in the opinion and judgment subject to this caveat.

5324(3), does not alter this balance. A requirement that criminal conduct be "willful" generally "means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law." *Scanio*, 900 F.2d at 489 (quoting *American Surety Co. v. Sullivan*, 7 F.2d 605, 606 (2d Cir.1925) (L. Hand, J.)). This canon of construction derives from the well settled principle that ignorance of the law or mistake of law generally is no defense in criminal prosecutions. *See Cheek v. United States*, 498 U.S. 192, ___, 111 S.Ct. 604, 609, 112 L.Ed.2d 617 (1991).

Only in certain limited contexts have courts interpreted the term "willfully" as requiring proof of an intentional violation of a known legal duty. Shirk points to two such contexts, which he contends are analogous to the present case. First, Shirk argues that this case is similar to cases involving prosecutions for failure to file Currency and Monetary Instrument Reports under 31 U.S.C. § 5316 (1988). When interpreting the term "willfully" in section 5322 in the context of violations of section 5316, courts in other circuits have required knowledge of the law making the defendant's conduct illegal. *See, e.g., United States v. Dichne*, 612 F.2d 632, 636 (2d Cir.1979) (construing prior versions of sections 5316 and 5322), *cert. denied*, 445 U.S. 928, 100 S.Ct. 1314, 63 L.Ed.2d 760 (1980). Shirk argues that it would be inconsistent to interpret "willfully" as requiring a lesser *mens rea* in structuring cases under section 5324(3). Second, Shirk asserts that structuring is a *malum prohibitum* regulatory offense, which, like other such offenses, requires knowledge of illegality. Shirk relies principally on *United States v. Pomponio*, 429 U.S. 10, 12, 97 S.Ct. 22, 24, 50 L.Ed.2d 12 (1976), in which the

Supreme Court held that "willfulness" in the context of prosecutions for income tax violations means "intentional violation of a known legal duty."

Neither analogy is fitting. Section 5316 obligates individuals to report currency imports and exports in excess of $10,000. Courts have required knowledge of illegality in the context of section 5316 because that section regulates "otherwise innocent transactions." *Scanio*, 900 F.2d at 491. The conduct proscribed by section 5324(3) is not similarly "innocent." Section 5324(3) prohibits structuring a transaction "for the purpose of evading" federal reporting requirements. It targets individuals who know of a financial institution's legal obligation to file reports, and who purposefully act to prevent the bank from providing the government with the information to which it is entitled. Section 5324(3), therefore, contains an element of wrongfulness, or culpability, that is not present in section 5316. *See id.; Hoyland*, 914 F.2d at 1129 (noting that "structuring is not the kind of activity that an ordinary person would engage in innocently").

Shirk's reliance on *Pomponio*, a case involving tax violations, is also misplaced. In *Cheek*, 498 U.S. at ___, 111 S.Ct. at 609, the Supreme Court limited the *Pomponio* definition of willfulness to tax cases, which require "special treatment" because of the "complexity of the tax laws."

> The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of

> the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses.

Id. The currency reporting and structuring laws are not as complex as the often Byzantine tax code. Consequently, we need not extend to the anti-structuring statutes the same "special treatment" of defining "willfulness" as the specific intent to violate the law. *See Dashney*, 937 F.2d at 540.

The legislative history of the anti-structuring statutes lends unqualified support to our interpretation of the criminal *mens rea*. In 1986, Congress enacted section 5324(3) to resolve a dispute among circuits as to whether structuring to evade federal reporting requirements was a crime. *See* S.Rep. No. 433, 99th Cong., 2d Sess. 21-22 (1986). In so doing, Congress sought to codify *United States v. Tobon-Builes*, 706 F.2d 1092 (11th Cir.1983), and like cases. S.Rep. No. 433, *supra*, at 21-22. In *Tobon-Builes*, the Court of Appeals for the Eleventh Circuit held that the defendant's "willfulness was clearly established by evidence showing he knew about the currency reporting requirements and that he purposely sought to prevent the financial institutions from filing required reports." 706 F.2d at 1101.[7] As the same court noted recently in *Brown*, 954 F.2d at 1569, it is likely that in codifying *Tobon-Builes* Congress intended to adopt the holding "that knowledge of the reporting requirements and intent to evade them

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[7] The defendant in *Tobon-Builes* was prosecuted for structuring under 18 U.S.C. § 1001 (concealing a material fact from the government by trick, scheme or device) and 18 U.S.C. § 2(b) (causing another to commit an offense).

constitute the 'willful' state of mind required [for a structuring conviction]."

In a Senate Report, the Committee on the Judiciary provides an example of punishable structuring, which illustrates the *mens rea* Congress intended to adopt:

> [A] person who converts $18,000 in currency to cashier's checks by purchasing two $9,000 cashier's checks at two different banks or on two different days with the *specific intent that the participating bank or banks not be required to file Currency Transaction Reports* for those transactions would be subject to potential civil and criminal liability.

S.Rep. No. 433, *supra*, at 22 (emphasis added). The only necessary culpability is the "specific intent" to prevent the participating bank or banks from filing CTRs. There is no requirement of a specific intent to violate the anti-structuring laws.

In the present case, the district court instructed the jury that the Government had to prove, beyond a reasonable doubt, that Shirk "willfully structured . . . a currency transaction" and that "the purpose of the structured transaction was to evade the reporting requirement that the bank had." App. at 460. The court reiterated that the jury could not convict Shirk unless it found that he "intentionally structured his currency transactions for the purpose of evading the reporting requirement that had been imposed upon the bank." *Id.* at 461. These charges adequately covered the *mens rea* of structuring under section 5324(3): knowledge of the legal reporting

requirements and the intent to prevent the bank from furnishing the required information.[8]

Shirk also argues that the district court erred in failing to instruct the jury that the element of willfulness would be negated if he believed in good faith that his banker, Timothy Sandoe, had the authority to permit him to structure his deposits in amounts under $10,000 without violating the law. Because knowledge of the illegality of structuring is not part of the criminal *mens rea*, Shirk was not entitled to a jury instruction on good faith. *See Hoyland*, 914 F.2d at 1130.[9]

V.

We now consider Shirk's claim that the district court committed reversible error by admitting the expert testimony of IRS Agent MacReady. Because Shirk's counsel failed to object contemporaneously with the admission of MacReady's testimony, we review the district court's admission of the testimony under the plain error standard of Fed.R.Crim.P. 52(b). *See Government of the Virgin Islands v. Smith*, 949 F.2d 677, 681 (3d Cir.1991). Rule 52(b) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

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[8] In light of our conclusion that the Government did not have to prove Shirk knew structuring is illegal, we need not address his claim that the Government failed to prove such knowledge.

[9] We have considered Shirk's other complaints regarding the jury instructions and find them to be without merit.

The Supreme Court repeatedly has cautioned courts of appeals to invoke the plain error doctrine "sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *United States v. Young*, 470 U.S. 1, 15, 105 S.Ct. 1038, 1046, 84 L.Ed.2d 1 (1985) (quoting *United States v. Frady*, 456 U.S. 152, 163 n. 14, 102 S.Ct. 1584, 1592 n. 14, 71 L.Ed.2d 816 (1982)). We are instructed to reverse only "particularly egregious errors," which "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Id.* (quoting *Frady*, 456 U.S. at 163, 102 S.Ct. at 1592; *United States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80 L.Ed. 555 (1936)). This court reviews decisions for plain error on a case by case basis. *United States v. Thame*, 846 F.2d 200, 205 (3d Cir.), *cert. denied*, 488 U.S. 928, 109 S.Ct. 314, 102 L.Ed.2d 333 (1988). Factors relevant to our inquiry include "the obviousness of the error, the significance of the interest protected by the rule that was violated, the seriousness of the error in the particular case, and the reputation of judicial proceedings if the error stands uncorrected." *Id.*

Shirk contends that the district court committed plain error by failing to exclude MacReady's testimony under Fed.R.Evid. 702. Rule 702 permits a person with specialized knowledge to testify as an expert if it "will assist the trier of fact to understand the evidence or to determine a fact in issue." According to the advisory committee notes:

> There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular

> issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.

Fed.R.Evid. 702 advisory committee's note (quoting Ladd, *Expert Testimony*, 5 Vand.L.Rev. 414, 418 (1952)). Shirk argues that the average juror can fully comprehend the subject of structuring. Thus, he argues, MacReady's expert testimony on the subject was inadmissible under Rule 702.

Shirk also contends that MacReady's testimony was inadmissible under Fed.R.Evid. 704(b), which precludes expert testimony that states an opinion "as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged." MacReady defined "structuring" as a situation where a person "will *deliberately* break down a deposit or cause a deposit to be made which is under the ten thousand dollar filing limit." App. at 339 (emphasis added). He then offered his opinion that Shirk had structured the currency deposits and money order purchases charged in the indictment. According to Shirk, since MacReady's definition of "structuring" incorporated "deliberate[ness]," his opinion that Shirk "structured" transactions implied that did so "deliberately," that is, with the intent required for a conviction. Shirk also notes that MacReady's opinion was based in part on evidence that Shirk told an IRS agent of his intent to deposit the $80,680 found in one of his safes in amounts under $10,000 to avoid having CTR's filed with the IRS. To the extent that MacReady's opinion was based on this admission of intent, Shirk argues it improperly suggested that the

transactions charged in the indictment were structured with the same wrongful intent.

We need not decide whether the district court erred by failing to exclude all or part of MacReady's testimony. Assuming *arguendo* that the district court erred, neither of the alleged errors was so obvious or "plain" that "the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States v. Frady*, 456 U.S. 152, 163, 102 S.Ct. 1584, 1592, 71 L.Ed.2d 816 (1982). The presence of substantial alternative evidence supporting Shirk's conviction also counsels against a finding of plain error. *See Thame*, 846 F.2d at 207-08. Such evidence significantly diminishes the seriousness of any error that the district court might have committed.

First, the records introduced at trial evinced an ongoing pattern of deposits under $10,000, commencing only after Shirk received notification from the bank that his CTR filing exemption had been revoked. Specifically, the records showed that in the fourteen months prior to receiving notification, Shirk made over forty currency deposits in amounts greater than $10,000. In the eleven months after receiving notification, Shirk made over eighty currency deposits, but none in excess of $10,000. Second, Shirk simultaneously presented three money orders, each in amounts of just under $10,000, to purchase property at a real estate closing. Although presented together, the money orders were purchased on three separate days, all within two to three weeks prior to

the closing.[10] Finally, Shirk admitted to an IRS agent that he planned to structure cash deposits of more than $80,000 to avoid having CTRs filed. Shirk's avowed intent to structure future transactions to evade the filing requirements circumstantially supported the conclusion that he structured the transactions in question for the same illicit purpose.

Because any error committed by the district court was not particularly obvious and Shirk's conviction was independently supported by other properly admitted evidence, admission of the disputed testimony did not impair the integrity of the trial or result in a miscarriage of justice.

VI.

Having rejected Shirk's challenges to his conviction, we now turn to his sentence. Shirk claims that the district court misinterpreted the Sentencing Guidelines and, as a result, erroneously calculated his base offense level at thirteen, rather than at five. He also claims that the district court improperly increased his offense level by four points based on the finding that he structured funds in excess of $600,000. His challenge to the four-level increase focuses not on the district court's interpretation of the Guidelines, but on its factual finding that the structured funds exceeded $600,000.

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[10] The jury reasonably could infer from the fact that Shirk signed the money orders that he also purchased them.

We exercise plenary review over legal questions concerning the proper interpretation of the Sentencing Guidelines. *United States v. Inigo*, 925 F.2d 641, 658 (3d Cir.1991). We apply the clearly erroneous standard to factual determinations underlying the district court's application of the Guidelines. *Id; United States v. McDowell*, 888 F.2d 285, 292 (3d Cir.1989).

A.

Sentencing Guidelines § 2S1.3(a) governs the determination of base offense level for a number of substantive offenses, including Shirk's unlawful structuring.[11] Section 2S1.3(a)(1) prescribes base offense level thirteen if a defendant: "(A) structured transactions to evade reporting requirements; or (B) knowingly filed, or caused another to file, a report containing materially false statements." Section 2S1.3(a)(2) prescribes base offense level five "otherwise." The commentary to the guideline simply tracks the language of the guideline itself: "A base offense level of 13 is provided for those offenses where the defendant either structured the transaction to evade reporting requirements or knowingly filed, or caused another to file, a report containing materially false statements. A lower alternative base offense level of 5 is provided in all other cases." U.S.S.G. § 2S1.3, comment. (backg'd.) (1991).

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[11] Except where otherwise indicated, we refer to the November 1991 Sentencing Guidelines and commentary, which were in effect at the time of Shirk's sentencing.

Guidelines section 2S1.3(a) and its commentary plainly mandate base offense level thirteen for Shirk because he structured transactions to evade federal reporting requirements. In arguing that the district court should have applied base offense level five, Shirk relies principally on the commentary to the former Guidelines § 2S1.3, which was in effect at the time of his offenses. Former Guidelines § 2S1.3(a)(1) (effective November 1, 1989) provides base offense level thirteen if the defendant "(A) structured transactions to evade reporting requirements; (B) made false statements to conceal or disguise the evasion of reporting requirements; or (C) reasonably should have believed that the funds were criminally derived property." Section 2S1.3(a)(2) of the former Guidelines calls for base offense level five "otherwise." The commentary explains:

> A base offense level of *13* is provided for those offenses where the defendant either *structured the transaction to evade reporting requirements,* made false statements to conceal or disguise the activity, or reasonably should have believed that the funds were criminally derived property. *A lower alternative base offense label of 5 is provided in all other cases.* The Commission anticipates that such cases will involve simple recordkeeping or other more minor *technical violations* . . . by defendants who reasonably believe that the funds at issue emanated from *legitimate sources.*

U.S.S.G. § 2S1.3, comment. (backg'd.) (1989) (emphasis added). As best we can tell, Shirk's argument is that the last sentence of the commentary implies that structuring to evade reporting requirements merits a base level of five under the former Guidelines if the structuring is

"technical" and the structured funds are "legitimate." Shirk states that his structuring was "technical" because he had no unlawful objective, and that the funds he was convicted of structuring were "legitimate" business proceeds. Thus, he concludes, the former commentary calls for base offense level five.

We note that the Sentencing Commission's commentary should be regarded "as an integral part of the Guidelines package." *United States v. Bierley,* 922 F.2d 1061, 1066 (3d Cir.1990). Though ancillary to the actual Guidelines, *see United States v. Anderson,* 942 F.2d 606, 611 (9th Cir.1991) (en banc), the commentary is generally regarded as more persuasive than ordinary legislative history, *see Bierley,* 922 F.2d at 1066. Unlike ordinary legislative history, which could reflect minority views as to the meaning of the described legislation, the commentary is passed by the Sentencing Commission as a whole and we therefore regard it as a more accurate reflection of underlying intent.

We also note that Shirk is entitled to the benefit of former Guidelines and commentary if they are more favorable to him than the ones in effect at the time of his sentencing. Ordinarily, we must apply the Guidelines in effect at the time of sentencing. *See United States v. Badaracco,* 954 F.2d 928, 934 n. 4 (3d Cir.1992). However, where the Guidelines have been amended subsequent to the commission of the crime so as to increase a defendant's base offense level, *ex post facto* concerns require us to apply the earlier Guidelines. *See United States v. Kopp,* 951 F.2d 521, 526 (3d Cir.1991).

The former commentary on which Shirk relies, however, mandates an award of base level thirteen, not five. According to the commentary, base level thirteen applies whenever "the defendant . . . structured the transaction to evade the reporting requirement." U.S.S.G. § 2S1.3, comment. (backg'd) (1989). Base level five can apply only in "other cases." *Id.* Because Shirk structured transactions to evade the reporting requirements, the commentary unambiguously requires that he receive base level thirteen. It makes no difference whether his structuring was in some sense "technical" or whether his structured funds were "legitimate."[12]

Contrary to Shirk's suggestion, our holding that base level thirteen applies in all cases where a defendant structures transactions for the purpose of evading the reporting requirements does not render the reference to base level five in the Guidelines superfluous or, as he puts it, ambiguous. We agree that an ambiguity would exist if base level five did not apply to any of the offenses covered by Guidelines § 2S1.3. As Shirk's counsel stated at the sentencing hearing, "[s]omething has to be a level 5" in order for section 2S1.3(a) to make sense. App. at 182. A review of the statutes covered by section 2S1.3,

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[12] Even if the earlier Guidelines or commentary did prescribe base level five for "technical" structuring, Shirk's offense still would not qualify. The evidence established that, for almost a year, Shirk engaged in an ongoing plan to structure currency transactions involving more than $600,000 for the specific purposes of evading federal reporting requirements and depriving the government of information to which it was legally entitled. By any reasonable definition, Shirk's structuring was not "technical."

however, reveal several offenses other than structuring to which base offense level five could apply.

For example, 31 U.S.C. § 5324(1) makes it unlawful to "cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a)" for the purpose of evading reporting requirements. Furthermore, 31 U.S.C. § 5314 (1988) and applicable regulations require persons having an interest in or authority over a financial account in a foreign country to report any such relationship to the Commissioner of Internal Revenue. *See* 31 U.S.C. § 5314 (1988); 31 C.F.R. § 103.24 (1992). Finally, 26 U.S.C. §§ 6050I (1988 & Supp. II 1990) and 7203 (Supp. II 1990) criminalize, among other things, the willful failure of a person engaged in a trade or business to report a transaction resulting in the receipt of more than $10,000 in cash. The gravamen of each listed offense is willfully failing to file, or willfully causing another to fail to file, a required financial report. Because the culpable conduct does not involve structuring or the filing of a false report, base offense level five would apply. *See* U.S.S.G. § 2S1.3(a).

B.

Finding that Shirk structured transactions involving more than $600,000, the district court increased Shirk's offense level by four levels, from thirteen to seventeen. The Guidelines provide for an enhancement of the defendant's offense level if the base offense level is thirteen and the value of the structured funds exceeds $100,000. U.S.S.G. § 2S1.3(b)(2). A four-level increase is prescribed

where the funds exceed $600,000. U.S.S.G. § 2S1.1(b)(2)(E).

Shirk argues that the evidence showed a series of deposits over eleven months adding up to more than $600,000, but that the Government failed to prove which deposits in the series were in fact "structured." Substantial evidence supports a finding that Shirk structured all the currency deposits made after his CTR filing exemption was revoked. These deposits total in excess of $600,000. Consequently, the district court properly increased Shirk's offense level by four levels.

VII.

We last address the Government's cross-appeal. The Government claims that the district court erred in departing downward from the applicable Sentencing Guidelines range. The Government also contends that the district court erred in failing to impose a two-level enhancement under the Guidelines for obstruction of justice. We will review these objections separately.

A.

A sentencing court must impose a sentence within the range prescribed by the Guidelines unless "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines and that should result in a sentence different from that described." 18 U.S.C. § 3553(b) (1988); U.S.S.G. § 5K2.0. "This provision is mandatory."

United States v. Uca, 867 F.2d 783, 786 (3d Cir.1989). When determining whether a circumstance was adequately taken into consideration, "the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission." 18 U.S.C. § 3553(b). Whether circumstances have been adequately considered by the Sentencing Commission is subject to plenary review. *United States v. Shoupe*, 929 F.2d 116, 119 (3d Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 382, 116 L.Ed.2d 333 (1991).

The district court believed Shirk's conviction to be "atypical" because: (1) Shirk was acquitted on criminal tax charges; (2) it appeared that he "only structured legitimate business proceeds into his own legitimate bank accounts;" (3) he may not have realized structuring was a criminal act; and (4) he was subject to a substantial forfeiture. App. at 240. For these reasons, the district court concluded that a downward departure was appropriate pursuant to Guidelines § 5K2.0. We hold that the factors relied upon by the district court were adequately taken into consideration by the Sentencing Commission and were not valid grounds for departure.

The mere fact that Shirk was acquitted of criminal tax evasion does not in any way diminish his culpability for the structuring offenses he committed, and does not make Shirk's conviction "atypical" under the Guidelines. Shirk's acquittal on the tax counts, therefore, is not grounds for departing from the Guidelines. Even if, as the district court concluded, Shirk's acquittal is evidence that he structured only legitimate business proceeds, not laundered money, a downward departure still would not be warranted. The Sentencing Guidelines provide for a four-

level increase from the base offense level due to the specific offense characteristic that "the defendant knew or believed that the funds were criminally derived property." U.S.S.G. § 2S1.3(b)(1). It follows that in circumstances where the defendant did not structure or believe he or she was structuring criminally derived property, the Commission intended the base offense level to remain unchanged.

Nor is it relevant that Shirk might not have known that structuring is illegal. Although there may be occasional if not rare instances in which ignorance of the law is grounds for a downward departure, no departure is appropriate where, as here, a proven element of the defendant's crime is the purposeful evasion of a known legal requirement. The jury convicted Shirk because, as required by 31 U.S.C. § 5324(3), evidence established beyond a reasonable doubt that he knew of the federal CTR filing requirements and structured transactions "for the purpose of evading" those requirements. The Guidelines very clearly prescribe base offense level thirteen and certain potential upward adjustments for individuals, such as Shirk, whose only culpable conduct is "structur[ing] transactions to evade reporting requirements." U.S.S.G. § 2S1.3(a)(1)(A). Shirk simply cannot contend that he possessed a diminished *mens rea* not adequately taken into account by the Guidelines.

Finally, Guidelines § 5E1.4 states that "[f]orfeiture is to be imposed upon a convicted defendant as provided by statute." It is apparent from this section, which has been in existence since the Guidelines' inception in November 1987, that the Commission considered forfeiture when creating the guideline ranges for terms of

imprisonment. The fact that the forfeiture statute covering structuring offenses has been amended since 1987 to increase the amounts subject to forfeiture does not alter our analysis. We interpret the Guidelines' straightforward mandate that "forfeiture is to be imposed . . . as provided by statute" to mean that the Commission viewed monetary forfeiture as entirely distinct from the issue of imprisonment. For this reason, the district court improperly relied on Shirk's exposure to forfeiture as grounds for its downward departure.

B.

The Government also argues that the district court erred in failing to impose an enhancement for obstruction of justice. The Guidelines provide for a two-level increase in a defendant's offense level "if the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense." U.S.S.G. § 3C1.1. Included among the Guidelines' examples of conduct to which the enhancement applies is "providing materially false information to a probation officer in respect to a presentence or other investigation for the court." U.S.S.G. § 3C1.1, comment. (n. 3(h)).

The Government argues that Shirk's sentence should be enhanced because he provided the probation officer with false information on a sworn financial statement. There is no serious dispute as to whether Shirk supplied false information. However, Guidelines § 3C1.1 plainly requires that a defendant "willfully" obstruct or attempt

to obstruct the administration of justice. Because the Government seeks the enhancement, it bears the burden of proving willfulness by a preponderance of the evidence. *See United States v. Belletiere* 971 F.2d 961, 965 (3d Cir.1992). Furthermore, where a defendant provides false information to a probation officer, the information must be "materially" false. U.S.S.G. § 3C1.1, comment. (n. 3(h)).

In its memorandum to the court, the probation officer recommended against an enhancement for obstruction of justice, reasoning that the false information provided by Shirk was not material. Consistent with the probation officer's recommendation, the district court denied the enhancement, but made no finding on the issue of materiality. Instead, the district court accepted the possibility that "there were too many cooks in there spoiling the broth because of forms being passed back and forth from one person to another," and concluded that Shirk did not "obstruct[ ] justice in the sense in which I speak of that term." App. at 213. We interpret the district court's statements to imply that Shirk did not obstruct justice "willfully."

We apply the clearly erroneous standard in reviewing the district court's determination that Shirk did not "willfully" obstruct justice. *See United States v. Cusumano,* 943 F.2d 305, 315 (3d Cir.1991), *cert. denied,* ___ U.S. ___, 112 S.Ct. 881, 116 L.Ed.2d 785 (1992). The Government in its brief makes no attempt to demonstrate that the district court's findings as to willfulness are clearly erroneous, apparently assuming that the only disputed issue is whether Shirk's misstatements were material. Our own review of the record persuades us that the district court's findings are not clearly erroneous. Consequently, we hold

that the district court did not err in declining to apply an enhancement for obstruction of justice.

VIII.

For the foregoing reasons, we will affirm Shirk's conviction but will remand to the district court for resentencing [consistent] with this opinion including any calculation of the appropriate sentence by reason of any facts or law which have not been considered by the opinion.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-7123 and 92-7174

UNITED STATES OF AMERICA

Appellant in No. 92-7174

v.

RONALD P. SHIRK

Appellant in No. 92-7123

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE
DISTRICT OF PENNSYLVANIA
(Crim. No. 90-294)

Present: Greenberg, Cowen and Weis, *Circuit Judges*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel October 5, 1992.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 3, 1992, be, and the same is hereby affirmed as to Ronald P. Shirk's conviction but the cause is remanded to the District Court for resentencing

within the guideline range for offense level [17]. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ Sally Mrvos
Clerk

Dated: December 3, 1992
Certified as a true copy and issued in lieu of a formal mandate on March 5, 1993.

Teste: /s/ P. Douglas Sisk
Clerk, U.S. Court of Appeals for the Third Circuit.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-7123 and 92-7174

UNITED STATES OF AMERICA,

Appellant in No. 92-7174

v.

RONALD P. SHIRK,

Appellant in No. 92-7123

SUR PETITION FOR REHEARING

BEFORE: GREENBERG, COWEN and WEIS, *Circuit Judges*

The petition for rehearing filed by Ronald P. Shirk in the above-entitled cases having been submitted to the panel, and the panel having considered the petition for rehearing and answer to the petition for hearing, the petition for panel rehearing is granted and the Opinion of the Court filed December 3, 1992, will be amended by separate order filed simultaneously with this order.

By the Court,

/s/ Robert E. Cowen
Circuit Judge

Dated: FEB 16 1993

Filed February 16, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-7123 and 92-7174

UNITED STATES OF AMERICA,

Appellant in No. 92-7174

v.

RONALD P. SHIRK,

Appellant in No. 92-7123

On Appeal from the United States
District Court
for the Middle District of Pennsylvania
(D.C. Criminal No. 90-00294)

Argued October 5, 1992

BEFORE: GREENBERG, COWEN and
WEIS, *Circuit Judges*

ORDER AMENDING SLIP OPINION

IT IS HEREBY ORDERED that the slip opinion filed December 3, 1992, be amended as follows:

Page 36, Section VIII, is deleted and the following Section VIII is substituted in its place:

"VIII.

For the foregoing reasons, we will affirm Shirk's conviction but will remand to the district court for resentencing consistent with this opinion including any calculation of the appropriate sentence by reason of any facts or law which have not been considered by the opinion."

By the Court,

/s/ Robert E. Cowen
Circuit Judge

Dated: February 16, 1993

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX E

UNITED STATES DISTRICT COURT

Middle District of Pennsylvania

UNITED STATES OF AMERICA

V.

Ronald P. Shirk

(Name of Defendant)

(Filed March 3, 1992)

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

Case Number: 1:CR-90-294

Stephen R. Lacheen, Esquire

James Evans, Esquire

Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____ .

[x] was found guilty on count(s) 9, 10 after a plea of not guilty,

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
31:5324(3), 5322(b) & 18:2	Structure financial transactions for purpose of evading income tax and Aid & Abet.	4/15/85-2/15/90	9, 10

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[x] The defendant has been found not guilty on count(s) 1, 2, 3, 4, 5, 6, 7, 8 , and is discharged as to such count(s).

[ ] Count(s) _____ (is) (are) dismissed on the motion of the United States.

[x] It is ordered that the defendant shall pay a special assessment of $100 , for count(s) 9, 10 , which shall be due [ ] immediately [ ] as follows:

Paid through the Clerk of Court, Harrisburg, Pa.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 173-32-0803

Defendant's Date of Birth: _____

Defendant's Mailing Address:

R.D. #2, Box 1775
Lebanon, Pa. 17042

Defendant's Residence Address:
R.D. #2, Box 1775
Lebanon, Pa. 17042
3/3/92
Date of Imposition of Sentence

/s/ William W. Caldwell
Signature of Judicial Officer

William W. Caldwell,
U.S. District Judge
Name & Title of Judicial Officer
3/3/92

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 9 months on each of counts 9 and 10 to be served concurrently.

[x] The court makes the following recommendations to the Bureau of Prisons:

That the institution at Minersville be designated as the place for serving this sentence if the Bureau of Prisons finds it is an appropriate institution for Mr. Shirk.

[ ] The defendant is remanded to the custody of the United States marshal.

[ ] The defendant shall surrender to the United States marshal for this district.

a.m.
[ ] at ____ p.m. on _____ .
[ ] as notified by the United States marshal.

[x] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

[x] before 2 p.m. on April 13, 1992 .

[ ] as notified by the United States marshal.

[ ] as notified by the probation office.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 2 years on each of counts 9 and 10 to be served concurrently.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[x] The defendant shall report in person to the probation office in the district to which the defendant is

released within 72 hours of release from the custody of the Bureau of Prisons.

[ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

[ ] The defendant shall not possess a firearm or destructive device.

In addition the defendant shall pay any balance of the fine imposed in full within 90 days of release and shall provide his probation officer access to any requested financial information.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm

the defendant's compliance with such notification requirement.

FINE

The defendant shall pay a fine of $25,000 . The fine includes any costs of incarceration and/or supervision.

[x] This amount is the total of the fines imposed on individual counts, as follows:

We direct that Mr. Shirk pay the United States fines of $12,500 on each of counts 9 and 10.
Paid through the Clerk of Court, Harrisburg, Pa.

[ ] The court has determined that the defendant does not have the ability to pay interest. It is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

This fine plus any interest required shall be paid:

[ ] in full immediately.

[ ] in full not later than _____ .

[ ] in equal monthly installments over a period of ____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.

[ ] in installments according to the following schedule of payments:

The fine shall be payable during the period of incarceration with the payment of any balance to be a condition of supervised release. We also direct that the defendant pay the costs of prosecution, and we understand there has been an agreement as to that, that the costs are in the sum of $38,686.64.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

STATEMENT OF REASONS

[x] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 17

Criminal History Category: I

Imprisonment Range: 24 to 30 months

Supervised Release Range: 2 to 3 years

Fine Range: $5,000 to $1,000,000

[ ] Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ _____ .

[ ] Full restitution is not ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[x] for the following reason(s): Mr. Shirk was acquitted on criminal tax charges. No criminal intent was proven by the Government, thus it appears that Mr. Shirk only structured legitimate business proceeds into his own legitimate bank accounts, which he may not have realized was a criminal act. For these reasons and for the reason that the defendant is subject to a substantial financial forfeiture, the Court considers the present case "atypical" and departs downward in accordance with Section 5K2.0.